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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 547

In the Matter of the Application of

POLICARPOS RAMANTANIN,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules

against

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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The Issue

Petitioner brought this proceeding to challenge fourteen questions and answers on a civil service promotion examination for New York City Police Captain. The issue on this application for a writ of certiorari is whether this proceeding can be elevated to the dignity of a Federal constitutional question on a claim of violation of due process and equal protection. We maintain the contrary on the principle that the determination of merit and fitness for local public office and employment is a matter of state concern.

Facts

(1)

The petitioner, a Lieutenant in the Police Department, participated in a promotion examination for the position of Captain. He took the written part of the test (Part I) on January 21, 1961 (6).* It consisted of one hundred multiple choice questions (*id.*). The candidates were instructed to select the answer "which you believe to be the acceptable one among the choices listed" (*id.*).

The tentative key answers to the questions were published on January 30, 1961 (6). The petitioner filed protests with regard to the answers for 14 of the questions (7). The protests were rejected (8).

The passing mark for Part I of the examination was 70 (6). On December 28, 1961, petitioner was informed that he had received the failing mark of 64.6 (9).

The petition alleges generally that the examination used faulty and unclear language (7-8, 9-10). It quotes each of the challenged questions together with its key answer and the answer selected by the petitioner, and it includes an explanation of why the petitioner believes his answer was appropriate (13-46).

The petition also alleges that representatives of the Personnel Department met with representatives of the Police Department on January 27, 1961, to review and discuss the answers prior to publication (12). As a result Question 61 was deleted (*id.*). It alleges that this meeting vio-

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* Unless otherwise noted, numbers in parentheses refer to pages of the Record on Appeal in the Appellate Division of the New York Supreme Court.

lated Personnel Rule 4.4.4, and that the violation of the rule denied the petitioner the equal protection of the laws (12-13).

(2)

The answer is supported by an affidavit of Theodore H. Lang, the then Personnel Director (51-55). In this affidavit he states that on January 27, 1961 (six days after the examination was given), a representative of the Civil Service Commission met with a representative of the Police Department for the purpose of reviewing and discussing the tentative key answers prior to their publication (52). For the most part, the police representative agreed that they were correct, but he called attention to a recent change in the "Uniform Crime Reports," which led to a decision that there was no correct answer to Question 61 (*id.*). [Petitioner, it should be noted, does not contest the action taken with regard to Question 61, limiting himself to urging that the consultation with police officials was improper.]

The affidavit of the Personnel Director also states that the examination instructions to "select that answer which you believe to be the acceptable one among the choices listed" means the same thing as a direction to select the most acceptable answer except that, where two answers are equally acceptable, both may be treated as correct under the instructions used here (54-55).

Annexed to the affidavit is the Personnel Department's analysis of the questions and answers protested by the petitioner (56-77).

Petitioner submitted a reply affidavit in which he advanced some further argument with respect to some of the questions on the examination (79-81). He also argued

that the instructions did not indicate to the candidate "that he must weigh each choice against the other choices in order to select that one which is the best answer" (82).

Opinion Below

Mr. Justice Hofstadter, in denying the application and dismissing the petition in the court of original jurisdiction, wrote an opinion (83-84).

The opinion first stated that the petition must fall unless it demonstrates that the refusal to adopt petitioner's answers was an abuse of discretion or was patently wrong. It stated that no such demonstration was made. It then stated that the Court may not intervene to resolve a difference of opinion when the choice of the examiner was objectively based on technical authority.

The opinion pointed out that some of the key answers under review in this proceeding had been considered and sustained in a prior case which had been reviewed by the Appellate Division.

Finally, it said that the claimed violation of Personnel Rules 4.4.4 and 4.4.6 was too insignificant to affect either the validity of the examination or the answers judged correct by the examiners.

The Appellate Division affirmed, without opinion.

The New York Court of Appeals denied permission to appeal.

ARGUMENT

There is no substantial Federal question raised. The issues in the state courts were whether, in marking a Civil Service promotion examination, the Civil Service Commission of the Personnel Department had been arbitrary and capricious in selecting the answers to be marked correct and whether the plaintiff had been guilty of laches in delaying more than three years in perfecting his appeal to the intermediate appellate court.

(1)

The various contentions that there has been a violation of the equal protection and due process clauses of the Constitution are merely an attempt to elevate to a Federal constitutional issue the question of whether the Civil Service Commission acted properly in determining which answers on the civil service examination were marked as the correct ones. Plainly, this is a matter of State concern and raises no substantial Federal question.

This Court has held consistently that public employment by a State or its municipalities is a matter of local concern. *Garner* v. *Board of Public Works,* 341 U.S. 716 (1951); *Adler* v. *Board of Education,* 342 U.S. 485 (1952). An exception to this general rule is made where a State, as a condition of employment, promulgates a requirement that its members must foreswear membership in subversive organizations, without distinguishing between innocent and knowing association. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). Obviously, the instant case does not come within this exception.

There is no doubt of the right of a State to investigate competence and fitness for public employment. *Shelton* v.

Tucker, 364 U.S. 479, 485 (1960). This Court has repeatedly held that a denial by state action of a right to public office is not a denial of a right of property or of liberty secured by the due process clause. *Snowden* v. *Hughes*, 321 U.S. 1 (1944); *Cave* v. *Newell*, 246 U.S. 650 (1917); *Taylor and Marshall* v. *Beckham*, 178 U.S. 548 (1900).

In *Snowden, supra*, this Court said (321 U.S. at p. 8):

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Petitioner's papers do not show any intentional discrimination in determining the correct key answers. The basic issue of what are the best answers to the several questions plainly cannot be raised to the dignity of a Federal constitutional question.

(2)

The lengthy delay of the petitioner in proceeding with his appeal to the Appellate Division raised a question of laches. The Article 78 proceeding was commenced April 1962 and decided by Special Term in December 1963. The petitioner served his notice of appeal on January 6, 1964. He did not perfect the appeal to the Appellate Division until September 26, 1967—more than three years and nine months later. In the meantime, the promotion list was promulgated and appointments made from it; and the list has expired.

In our brief in the Appellate Division it was argued that, in addition to the propriety of the determination on the merits, the long delay of over three years and nine months by petitioner in bringing on his appeal barred relief to the petitioner. Although the Appellate Division wrote no opinion it may well have based its determination on this ground. This laches argument was also raised in opposition to petitioner's motion for leave to appeal to the Court of Appeals.

The bar of laches is a sufficient non-federal ground to preclude an appeal to this Court. *Utley* v. *City of St. Petersburg,* 292 U.S. 106 (1934); *Preston* v. *Chicago,* 226 U.S. 447 (1913).

(3)

Petitioner contends that he was unconstitutionally denied trial by jury. It is settled that the constitutional guarantee of trial by jury in civil cases does not apply to the states. *Olesen* v. *Trust Company of Chicago,* 245 F. 2d 522 (7th Cir. 1957), cert. den. 355 U.S. 896 (1957), and cases there cited. It is also well settled that where there is no genuine issue of fact a jury trial is not required, and summary judgment may be had. *United States* v. *Strangland,* 242 F. 2d 843 (7th Cir., 1957); *Nave* v. *City of Seattle,* 68 Wash. 2d 72, 415 P. 2d 93 (1966), app. dism. 385 U.S. 450 (1967); rehearing den. 386 U.S. 929 (1967). The New York Civil Practice Law and Rules provides for summary judgment on the pleadings and papers in special proceedings against a body or officer. CPLR 409(b), 7804(f), (g).

We submit that in the instant case, summary judgment was proper because the petitioner has not raised a triable issue of fact under the applicable New York rule with re-

gard to what is a proper answer to questions on a civil service test. The rule is that the answer designated as correct will be sustained unless it is not the best answer; and that no other answer need be accepted as correct unless it and the answer designated as correct are equally acceptable. This is the test applicable under the most recent decisions. *Matter of Acosta* v. *Lang,* 13 N Y 2d 1079 (1963); *Matter of Dolan* v. *Krone,* 16 N Y 2d 917 (1965); *Matter of Cronin* v. *Lang,* 18 N Y 2d 608 (1966).

The petitioner urges, in Paragraph 13 of his petition, that a different rule applies here because the instructions directed that the candidates "select that answer which you believe to be the acceptable one among the choices selected" and did not use the terms "best answer" or "most acceptable" answer (9). His brief in the Appellate Division stated that any answer "which fits the stem of the question is acceptable and merits credit" (App. Br., p. 3). It seems plain that the instructions mean that a candidate must select the most acceptable answer or, where more than one answer is equally as good, one of those answers. No reasonable person could conclude that it means that a less acceptable answer may be selected simply because it relates to the question or, as petitioner ambiguously put it, the answer "fits the stem of the question."

CONCLUSION

The application for a writ of certiorari should be denied.

October 15, 1968.

Respectfully submitted,

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